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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 421

JOHN McSHAIN, INC.,

Petitioner,

vs.

DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

FRED J. RICE,
MICHAEL M. DOYLE,
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DISTRICT OF COLUMBIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, John McShain, Inc. prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, which affirmed the decision of the Board of Tax Appeals for the District of Columbia, now the District of Columbia Tax Court, sustaining the respondent in holding petitioner liable for a Use Tax to the District of Columbia for the calendar month of September, 1949.

Statement of the Matter Involved

That the tax in controversy is a use tax for the calendar month of September, 1949, levied by the Assessor of the District of Columbia against petitioner. Said tax was paid by the petitioner under written protest. Said assessment is based upon the purchase and use of materials and supplies in the construction by the petitioner of the Dupont Circle Underpass, under a contract with the District of Columbia; the Editor's Building in the District of Columbia, under contract with a private owner, and the General Accounting Office Building, under a contract with the United States Government.

All projects were in the District of Columbia.

The contract with the District of Columbia for Dupont Underpass was entered into December 18, 1947; the contract with private interests for the Editor's Building, November 24, 1948, and the contract with the United States Government for the construction of the General Accounting Office, February 2, 1949. All these were executed before the enactment of the Sales & Use Tax Act. The Sales & Use Tax Act was approved May 27, 1949, and became effective as of August 1, 1949.

Petitioner claimed before the Board of Tax Appeals that the statute was retroactive, unconstitutional and discriminatory as applied to the petitioner.

The contracts with the United States and with the District of Columbia were tax exempt, and your petitioner claimed before said Board that the materials and supplies purchased and used by the petitioner were under sub-contracts made in pursuance of petitioner's said original contracts with the Federal and District Governments, said original contracts having been made before the date of said Tax Act, and that goods purchased under said sub-contracts were tax exempt.

Petitioner further claimed before said Board that the Assessor made the following erroneous tax assessment against petitioner:

> For form lumber. This form lumber was necessary for forms or molds to hold wet concrete in place during the construction of walls. This form lumber was forcibly stripped away from the walls after the concrete hardened. Said material became part of the realty, was consumed in the progress and completion of the building or project, and its value went into the building or project.

The said Board held the petitioner liable in the main for the use tax as levied by the Assessor. The Court of Appeals affirmed the decision of the Tax Board.

Jurisdiction

Jurisdiction of this Court is invoked under U. S. Code, Title 28, 1254 (1).

Opinions Below

The finding of the Board of Tax Appeals for the District of Columbia (R. 9).

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on June 25, 1953 (R. 128). A petition for rehearing of the appeal before the Court sitting in banc was filed on July 8, 1953. Rehearing was denied on August 17, 1953 (R. 142).

Questions Presented

1. Whether the Sales & Use Tax Act of the District of Columbia and the Regulations made thereunder, as attempted to be applied by the District of Columbia authorities in the instant case, are retroactive, unconstitutional, discriminatory and confiscatory?

2. Has the Federal Government, the lawmaking authority for the District of Columbia, the constitutional authority, when it has executed a contract for building the General Accounting Office building for a fixed sum, before the enactment of the District of Columbia Sales & Use Tax Act, to make the contractor liable for a tax to the District of Columbia for materials and supplies, purchased or used by the contractor in pursuance of its said original contract with the Federal Government, the proceeds of the tax being paid into the United States Treasury, the tax thus diminishing the fixed liability of the Federal Government?

3. The District of Columbia having executed a contract for building the Dupont Underpass for a fixed sum before the enactment of said Sales & Use Tax Act, has the Federal Government the constitutional authority to make the contractor liable to said District, under said Tax Act, for sub-contracts executed by the contractor for materials and supplies, in pursuance of its original contract, said materials and supplies being delivered to the contractor after the effective date of said Tax Act?

4. Is the District of Columbia's Use Tax Act retroactive as applied to sub-contracts made by a contractor for materials and supplies pursuant to, and necessary to comply with, contracts executed by said contractor to erect buildings or structures, said original contract for buildings or structures having been executed previous to the enactment of said Tax Act?

5. Does the said Sales & Use Tax Act apply to sub-contracts made by contractors engaged in building operations when said sub-contracts are for the purchase and use of materials and supplies and are made in pursuance of the original building contracts executed before the enactment of said Tax Act?

6. Was there any liability for Sales & Use Tax on the petitioner for materials and supplies, which were necessary or required to complete the building or structure pursuant to petitioner's contract? Said materials being consumed in whole or in part in their use when the contract was with the Federal or District of Columbia Government and was tax exempt.

7. Does the word "pursuant" as used in Sec. 128(k) of said Tax Act mean that all sub-contracts made by the original contractor are embraced within the section?

8. Is form lumber exempt from taxation under Sec. 1101(d) of the Regulations?

9. Is the petitioner liable for the claimed tax, penalty and interest for the month of September, 1949, in the amount of $964.67?

Specification of Errors to Be Urged

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding that the District of Columbia Sales & Use Tax Act, as applied to petitioner's contracts was not retroactive, discriminatory or confiscatory.

2. In holding that the United States did not alter petitioner's existing contracts with the United States or the District of Columbia and diminish petitioner's fixed rights under said contracts, when Congress passed said Sales & Use Tax Act.

3. In holding that the use tax levied on materials and supplies used in connection with the existing Editor's Building contract was lawful.

4. In holding that form lumber did not come within the provisions of Sec. 1101(d) of the Regulations and was not tax exempt,

5. In holding that sub-contracts made by the petitioner for the purchase of materials and supplies were not made pursuant to original contracts.

Pertinent Statutes & Regulations

District of Columbia Revenue Act of 1949—Title I
(D. C. Code, Title 47-2601, et seq. (1951); D. C. Code, Title 47-2701, et seq. (1951))

SEC. 117. "Sale" and "selling" mean any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred by any means whatsoever for a consideration by a vendor to a purchaser, or any transaction whereby services subject to tax under this title are rendered for consideration or are sold to any purchaser by any vendor, and shall include, but not be limited to, any "sale at retail" as defined in this title. Such consideration may be either in the form of a price in money, rights, or property or by exchange or barter, and may be payable immediately, in the future, or by installments.

SEC. 128. Gross receipts from the following sales shall be exempt from the tax imposed by this title:

(a) Sales to the United States or the District or any instrumentality thereof.

(k) Sales of goods made pursuant to bona fide contracts entered into before the date of approval of this Act: Provided, That there is a contract in writing signed by the purchaser and vendor which imposes an unconditional liability on the part of the purchaser to buy the goods covered thereby at a fixed price and without escalator clause, and an unconditional liability on the part of the vendor to deliver a definite quantity of such goods at the contract price.

Regulations Under D. C. Sales and Use Tax Act

SEC. 1101. Sales of material used in the construction, repair, or alteration of real property.—A taxable

"retail sale" includes the sale of material used in the construction, repair, or alteration, of real property, which material becomes real property upon completion of the work, regardless of whether or not such real property is to be sold or resold. As used herein, the word "contractor" includes "subcontractor". Responsibility for filing returns and paying the tax with respect to different types of contract for such construction is fixed as follows:

(d) Where a contractor enters into a construction contract with a semipublic institution holding a valid exemption certificate, or with the United States or District Governments or instrumentalities thereof, such contractor may purchase such materials and supplies as are to be physically incorporated in and become real property without payment of the tax and shall not charge any such semipublic institution, or government or any instrumentality of such government, reimbursement for any sales or use tax thereon. • • •

(d) (3) Where a contractor uses materials or supplies by using them in the construction, repair or alteration of real property for an exempt semipublic institution or government agency, and such contractor has already paid the sales or use tax on such materials or supplies at the time or purchase, he may deduct the purchase price of the same on his next monthly return as an adjustment.

Reasons for Allowance of the Writ

I. The Court of Appeals Has Decided an Important Question of Federal Law, Which Has Not, But Should Be, Settled by This Court

The United States had a contract with the petitioner for a fixed sum. The decision of the Court below, in effect, held that the United States had a right to subsequently pass a Tax Act which diminished the obligation of the United States to the petitioner under the contract. The money

from the tax, although paid to the District of Columbia, went into the Treasury of the United States and was subject to exclusive Federal control. This constituted a rebate and was in violation of the Fifth Amendment.

The District of Columbia having executed a contract with the petitioner for a fixed sum before the enactment of said Sales & Use Tax Act, the United States had no constitutional authority to make the petitioner pay taxes out of said fixed sum so contracted for on account of sub-contracts made for materials and supplies, said sub-contracts being made pursuant to petitioner's original contract, the United States Treasury being the recipient of the money from the tax. This was in violation of the Fifth Amendment.

II. Petitioner Believes This Is a Case of First Impression

Your petitioner believes that the question as to whether or not the United States Government, a party to a contract, in which it had a fixed liability, could alter said contract through subsequent legislation by compelling the petitioner to pay a tax in connection with said contract, the proceeds of said tax being paid into the United States Treasury, thus reducing the contractual liability of the United States Government, has never been passed on by this Court.

III. The Decision of the Court of Appeals as to the Liability of the Petitioner for a Tax on Form Lumber Used Is in Conflict With That Court's Decision in the Case of U. S. v. Chas. H. Tompkins Co., 63 Apps. D. C. 332, 72 F. 2d 383

In that case, the question was whether under the mechanics law, lumber for concrete forms was lienable material because of its use in erecting a building. In that case,

the Court held that recovery should be allowed on the theory that the contractor's material to the extent of its exhaustion in the work went into the building.

In the instant case, the Court of Appeals did not follow the *Tompkins* case, but held that the form lumber was not physically present or incorporated into the structure.

In the *Tompkins* case, supra, the Court of Appeals stated various State Courts have passed upon questions as to whether lumber for concrete forms is lienable material under their statutes, and said that many well considered cases hold that it is, certainly to the extent of its exhaustion in the work; the theory being that at least so much of its value went into the building, citing a number of cases.

One of the cases quoted by the Court of Appeals was *Chicago Lumber Co.* v. *Douglas,* 89 Kan. 316, 131 P. 563. In that case, the Court said:

> "The material in the forms furnished by appellee was understood by all to be a necessary part of the construction of the building. For a time these forms were an essential part of the walls, columns and partitions. They were provided for in the contract and their character was included in the specifications. While the walls were hardening they were as essential to the structure as the cement and sand which remained in the walls in a different form after the work was completed. These forms operated to enhance the value of the land on which they were used as did the labor in setting them up. They were finally taken down and removed, but the life and substance of the material had been used up in the erection of the building. The material cannot be regarded as a part of the contractors' plant because it was impregnated with cement and rendered practically unfit for other uses. It was used directly in the construction of the building, and being consumed in that use it can fairly be said that within the meaning of our statute it entered into and was used in the erection of the building. * * *"

IV. The Decision of the Court of Appeals Is in Conflict With the Applicable Decisions of This Court in Regard to Retroactive Law

Petitioner is of the opinion that the Court of Appeals' decision is in conflict with the decision in *Nichols* v. *Coolidge*, 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184; *Untermeyer* v. *Anderson*, 276 U. S. 440, 48 S. Ct. 353, 72 L. Ed. 645, and *Milliken* v. *U. S.*, 283 U. S. 15, 51 S. Ct. 324, 326, 75 L. Ed. 809.

In the case of *Hudson* v. *United States*, 12 Fed. Supp. 620, that Court in referring to the three cases mentioned, said:

> "We think putting those decisions together, it may be said that they hold in effect that if at a time a citizen enters into a transaction it is not taxable and he has no reason to believe or expect a tax will, in the future be imposed by reason of it, a valid tax thereon cannot be laid by a subsequent statute. In the case of Milliken v. U. S., supra, it was said that in Nichols v. Coolidge, supra, and Untermeyer v. Anderson, supra, the basis of the decision was 'that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax,' and by reason of this fact in both of these cases, the tax was held invalid * * *".

The United States and the District of Columbia each entered into a solemn valid contract with the petitioner with a stated money consideration. Subsequently, by a tax law, the Federal Government attempted to "impose a new duty" and diminish the respective financial contractual obligation by passing a tax law, the proceeds of the tax going into the United States Treasury.

In *Schwab* v. *Doyle*, 258 U.S. 529, 42 S. Ct. 391, 66 L. Ed. 747:

> "Tax measures are strictly construed."

The Court goes on to say:

> "• • • It is the sense of the situation that that which impels prohibition in such cases exacts clearness of declaration when burdens are imposed on completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated."

The petitioner had no way of knowing or anticipating that a Sales or Use Tax, if passed, would contain the requirements of Sec. 128(k), because this section is contrary to the custom of the trade. Had the petitioner known it, it could have entered into written contracts with the subcontractors for materials and supplies. The petitioner was taken by surprise and consequently should not be liable for taxes imposed as shown in the cases cited and quoted herein.

The contracts for the purchase of materials and supplies were made pursuant to the original existing contracts which were entered into before the passage of the Tax Act.

Justice Story is quoted in the *Minnesota Law Review, Vol. 20—1935, pg. 782,* as follows:

> "• • • Upon principal, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attached a new disability in respect to transactions or considerations already passed, must be deemed retrospective • • •."

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the District of Columbia Circuit be reversed by this Court; that your peti-

tioner may have such other and further relief in the premises as may seem just and proper.

Respectfully submitted,

FRED J. RICE,
MICHAEL M. DOYLE,
Counsel for Petitioner.

October 19th, 1953.

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JOHN McSHAIN, INC., *Petitioner,*

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DISTRICT OF COLUMBIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals for the District of Columbia (R. 16-23) is reported at 80 W. L. R. 1078. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 128-132) is reported at 205 F. 2d 882.

GROUNDS OF JURISDICTION

Although the petitioner has made a jurisdictional statement, apparently in compliance with Rule 28, par. 2, of this Court (Brief p. 3), it has not stated the grounds on which the jurisdiction of this Court is invoked as required by Rule 27, par. 2(c) of this Court.

SUMMARY OF ARGUMENT

The statute involved is limited in its operation to the District of Columbia, and therefore this Court should not grant the petition for writ of certiorari.

Petitioner's petition and brief have not been prepared in accordance with the rules of this Court, which is sufficient reason for denying the petition.

The United States Court of Appeals for the District of Columbia Circuit in this case has not decided an important question of Federal law which has not been decided by this Court. The contentions of petitioner that the tax involved violates the Fifth Amendment and impairs the obligations of its contracts is without merit. There can be no vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation. This court has decided in a number of cases that a taxing statute is not a denial of due process of law because retroactive.

In the present case, petitioner does not come within the terms of the exemption claimed because there was no proof of any contracts in writing between the petitioner and its various vendors covering the purchases of the materials in question.

The petition should be denied.

ARGUMENT

I

The Petition Should be Denied.

The statute involved is the District of Columbia Use Tax Act, approved May 27, 1949, 63 Stat. 124, et seq., Section 47-

2701, et seq., D. C. Code, 1951. This statute, although enacted by the Congress of the United States, is limited in its operation to the District of Columbia. This Court has stated that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia Circuit which are based upon statutes limited in their operation to the District of Columbia. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.

Petitioner's petition and brief, with exception of "Opinions Below", do not contain references to the record page number as required by Rule 27, par. 3; the grounds upon which it is contended that this Court has jurisdiction have not been stated as pointed out above, and petitioner's brief is merged with its petition contrary to Rule 27 and Rule 38, par. 2, of this Court, any one of which constitutes sufficient reason for denying the petition under Rule 38, par. 2, and *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178.

Although petitioner has listed some nine "Questions Presented", it has listed only four reasons relied on for the allowance of the writ.

The first reason given by petitioner for allowance of the writ is that the United States Court of Appeals for the District of Columbia Circuit has decided an important question of Federal law which has not been but should be settled by this Court. The basis for this contention is, as we understand petitioner's brief, first that with respect to the Federal government contract, the money from the tax went into the Treasury of the United States and was subject to exclusive Federal control, although paid to the District of Columbia, and this constituted a rebate in violation of the Fifth Amendment. There is no merit to this contention. The taxes involved are District of Columbia taxes. Although all such taxes are required to be paid into the Treasury of the United States, they are District funds. It

is specifically provided by law that such taxes shall be deposited in the Treasury to the credit of the District of Columbia and shall be disbursed for the expenses of the District of Columbia. Act of June 29, 1922, 42 Stat. 669, ch. 249; Secs. 47-501, 47-309, and 47-104, D. C. Code, 1951. The second basis for the contention is that the District of Columbia, having executed a contract with petitioner for a fixed sum before enactment of the statute involved, "the United States" had no constitutional authority to make the petitioner pay taxes out of the sum so contracted for on account of subcontracts made for materials and supplies. It is urged that this is in violation of the Fifth Amendment. The Supreme Court answered this contention in the case of *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, which involved the construction of the Sixteenth Amendment and other provisions of the Constitution of the United States, as well as the constitutionality of income tax provisions of the Tariff Act of October 9, 1913. This Court said (p. 24):

> "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause."

As pointed out in the opinion of the Court of Appeals in *Neild* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246, relied upon in this case (R. 130), power to legislate for the District of Columbia is expressly delegated by the Constitution to the Congress of the United States and that Congress may legislate within the District for every proper purpose of government. In the present case the Court of

Appeals thoroughly considered the contentions of petitioner and stated that the imposition of a new tax or an increase in the rate of an old one is one of the usual hazards of business enterprise; that the contract clause of the Constitution is a limitation on State rather than federal action; that Congress was not seeking in enactment of the statute here involved to repudiate or render profitless petitioner's contracts with the United States and the District of Columbia, and that there was no deprivation of the petitioner's property without due process of law. The Court thoroughly considered the petitioner's contentions with respect to the exemption provided in Section 128 of the statute involved (R. 131) and said that petitioner did not come within the terms of the exemption; that there was no proof of any contracts in writing between the petitioner and its various vendors covering the purchase of the materials in question.

Petitioner's contention on page 8 of its petition and brief that this case is one of first impression because the statute involved impairs the obligation of a contract is untenable, as pointed out in the opinion of the Court of Appeals (R. 129, 130). This Court stated in *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 484, adopting the language of the Supreme Court of Vermont, that there can be no vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority. See also *Blanchard Mach. Co.* v. *Reconstruction Finance Corporation Price Adjustment Board*, 85 U. S. App. D. C. 361, 177 F. 2d 727.

The third contention of petitioner that the decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with that Court's decision in the case of *United States* v. *Charles H. Tompkins Co.*, 63 App. D. C. 332, 72 F. 2d 383, constitutes no reason for allowance of the writ sought even if the case is in conflict with the

present decision of the Court of Appeals, because the United States Court of Appeals for the District of Columbia Circuit, while identical in most jurisdictional respects with other courts of appeal, also acts as the highest court for matters of concern only to the District. In this sense it is similar to the highest court of a State whose decisions this Court will ordinarily accept as final on local matters. *Stern and Gressman, Supreme Court Practice* (1950), p. 119. The *Charles H. Tompkins Co.* case involved the right of recovery on a government contractor's bond by one furnishing a subcontractor with lumber for concrete forms and is, of course, inapposite.

The remaining reason relied on by petitioner for allowance of the writ is that the decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with applicable decisions of this Court in regard to retroactive law. The petitioner relies upon certain decisions of this Court involving the taxation of gifts made and completely vested before the enactment of the taxing statute. The principal cases relied on are *Nichols* v. *Coolidge*, 274 U. S. 531, and *Untermyer* v. *Anderson*, 276 U. S. 440. These cases were distinguished by this Court in *Welch v. Henry*, 305 U. S. 134, 147, in which this Court said that since in those cases the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated tax, was thought to be so arbitrary and oppressive as to be a denial of due process. In the case of *Milliken* v. *United States*, 283 U. S. 15, also relied upon by petitioner, this Court specifically stated that a tax is not necessarily arbitrary and therefore invalid because retroactively applied. In that case, this Court upheld the tax although the objection to such tax, chiefly urged in the brief and argument, was that the taxing statute, as applied, was a denial of due process of law because retroactive. In *Welch* v. *Henry, supra*, this Court stated (p. 146) that taxa-

tion is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract; that it is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens; that since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process. See also *Brushaber* v. *Union Pacific R. Co., supra* and *Wagner* v. *Baltimore,* 239 U. S. 207, 216-220.

In the case of *Wiseman* v. *Gillioz,* 192 Ark. 950, 96 S. W. 2d 459, cited by the United States Court of Appeals (R. 130), it was contended that the sales tax act of Arkansas could not operate retroactively and impose a tax upon a given transaction not taxable when it occurred. As to this the Court said:

> "If appellees' contention is correct, then the state would be powerless to impose a tax or to increase its taxes, although it might become necessary to do so as to affect contracts made before a law became effective. One might have a valid contract, might have a note, the payment of which was secured by mortgage on large property, and no matter how necessary it became for the state to increase its taxes in order to meet its obligations, such increase would be void, as to these contracts, if the contention of appellees is correct.
>
> "Increasing taxation or adding a new tax does not impair the obligation of a contract. It is true that the law as it existed at the time the contract was made, is a part of the contract, but so is the law with reference to the state's power of taxation. * * * The state has the power to tax, and there is no contention made in this case that the tax is unreasonable, or that it is void for any reason, except that appellees say that it cannot apply to them because their contract antedated the law."

In the present case, as pointed out by the United States Court of Appeals (R. 131), petitioner does not come within

the terms of the exemption claimed because there was no proof of any contracts in writing between the petitioner and its various vendors covering the purchase of the materials in question.

CONCLUSION

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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